

STATE OF MICHIGAN
COURT OF APPEALS

RITA J. BAL and WILLIAM S. BAL,

Plaintiffs-Appellees,

v

PAUL MOON,

Defendant-Appellant,

and

JEANNE M. MOON,

Defendant.

UNPUBLISHED

October 28, 2014

No. 318034

Menominee Circuit Court

LC No. 12-014205-CH

Before: MURPHY, C.J., and SAWYER and M.J. KELLY, JJ.

PER CURIAM.

The parties in this litigation are plaintiffs Rita J. Bal and William S. Bal, mother and son, and defendants Paul Moon and Jeanne M. Moon, husband and wife. Defendant Paul Moon alone appeals as of right an order granting summary disposition in favor of plaintiffs in this quiet-title action involving real property located in Faithorn Township in Monominee County. The parties are adjoining landowners and the dispute concerned the proper location of the boundary line between their properties. Most of the arguments posed by Mr. Moon on appeal are procedural in nature, requiring construction and application of the Michigan Court Rules of 1985. Issues concerning the substance or the merits of the competing ownership claims are not before us. We affirm.

On November 6, 2012, plaintiffs filed their complaint to quiet title, and defendants were timely and personally served with the complaint on November 11, 2012. Plaintiffs set forth numerous allegations regarding various conveyances, legal descriptions, and chains of title, attaching several deeds to the complaint as exhibits. The complaint alleged that sometime around 2009, defendants began encroaching on property owned by plaintiffs and had continued to do so ever since that time. The area of the alleged trespass was the real property in dispute in the quiet-title litigation (hereafter “the property”). The dispute concerned the proper location of plaintiffs’ southern or defendants’ northern border. Plaintiffs alleged that defendants’ encroachments included, in part, the erection of a pasture fence and the digging of a pond on the

property. Plaintiffs asserted in the complaint that the encroachments were brought to defendants' attention, but nevertheless they had not been removed, and that defendants offered to purchase the property and requested a formal purchase agreement. Plaintiffs contended that they provided defendants with a purchase agreement; however, defendants never executed or returned the agreement. Instead, according to plaintiffs and as reflected in an attachment to the complaint, defendants prepared and executed a "deed by acquiescence and notice of claim of rightful ownership," which purported to transfer the property from defendants, "as tenants by the entirety," to themselves, "in trust and as co-trustees." The document, which plaintiffs alleged the register of deeds office refused to record after consultation with the county prosecutor, laid claim to the property under the legal doctrine of acquiescence. Mr. Moon drafted the "deed by acquiescence."

In the complaint, plaintiffs, in claiming ownership of the property, relied on a "2012 Plat of Survey" prepared by a licensed land surveyor. The survey does indicate that the property is owned by plaintiffs. The complaint alleged plaintiffs' belief that defendants might attempt to rely on "an incorrect survey . . . prepared in October of 2009 by an inexperienced land surveyor," which assertedly utilized the wrong starting point in the surveyed description where the legal description suggested the possibility of two different starting points. On the subject of the alleged proper starting point, plaintiffs attached a letter, witnessed by a notary public, from a predecessor owner of defendants' property. The former owner maintained that he had purchased the land in 1980 from a seller who at the time owned the land being sold along with much of the surrounding land. The letter indicated that they reached an agreement with respect to the starting point for purposes of the legal description.¹ According to the complaint, this agreed-upon starting point favored plaintiffs' claim to the property.

Plaintiffs requested that the trial court issue an order that quieted title to the property in their favor in accordance with the 2012 survey, that required immediate removal or abandonment of the encroachments, that enjoined any trespassing by defendants in the future, and that required defendants to pay costs and attorney fees.

On December 4, 2012, 23 days after the complaint had been served on defendants, plaintiffs filed a request and affidavit for entry of a default for failure to file an answer or to otherwise respond to the complaint. A default was not entered by the clerk. Apparently, a default was not entered because, also on December 4, 2012, defendants, acting pro se, filed a motion seeking dismissal for failure to state a cause of action, seeking a more definite statement, and seeking dismissal for intentionally perpetrating a fraud on the court.² We note that the request for a more definite statement, MCR 2.115(A), and the requests for dismissal were not

¹ The parties refer to the letter as an affidavit, and we will do the same for purposes of continuity and clarity, even though it technically did not meet all of the requirements necessary to constitute an affidavit. See MCR 2.119(B).

² The record indicates that the document was faxed to the trial court, and it was stamped as received by the court.

filed within the 21-day period applicable to filing an answer to the complaint or taking other responsive action, MCR 2.108(A)(1).

In the motion, defendants alleged the following: that the attached exhibits to plaintiffs' complaint did not bear legal descriptions consistent with the complaint's allegations; that the exhibits were "repugnant to the complaint," necessitating dismissal; that plaintiffs made a knowingly false claim of ownership; that plaintiffs were aware of defendants' ownership of the property "via [the] deed of acquiescence;" that defendants indeed owned the property; and that plaintiffs' complaint did not state a cause of action upon which relief could be granted given that plaintiffs did not own the property. Defendants further asserted: that plaintiffs committed a known fraud on the court by indicating ownership of "the property by way of a survey that was completed incorrectly for defendant[s] yet correctly somehow for plaintiff[s];" that plaintiffs conducted multiple surveys on the property until they obtained a favorable survey; that plaintiffs intentionally failed to attach other surveys in an effort to mislead the court; that the complaint should be dismissed for intentional misstatements and attempts to mislead the court relative to the claim that only one survey existed; and that defendants needed a more definite statement prior to filing an answer because the complaint "lends to confusion and prejudices defendant[s] from defending . . . without more information." Finally, defendants additionally alleged the following: that plaintiffs attached a hearsay affidavit to the complaint to support the alleged "correct" survey, yet offered no support as to why defendants' survey was incorrect; that defendants could not properly formulate defenses to the action without knowing more concerning plaintiffs' position on the various surveys; and that additional factual pleadings needed to be added to the complaint in regard to "the proper place to measure[.]"

In the motion's request for relief, defendants stated: "defendants respectfully request [that] the Court dismiss plaintiff[s]' complaint and in so doing, enter an order quieting title in defendant[s]' name and further enjoining the plaintiff[s] from entering or causing further harm to defendant[s]' property." Defendants attached all of the same exhibits that plaintiffs had attached to their complaint.

The record does not contain a notice of hearing in regard to defendants' motion, nor does the record contain a standard answer to the motion filed by plaintiffs. No hearing was held at the time to specifically address and resolve the motion. On April 8, 2013, plaintiffs filed a motion requesting entry of a default against defendants, dismissal of defendants' motion, and summary disposition in favor of plaintiffs pursuant to MCR 2.116(C)(8) and (9). Plaintiffs first argued that the trial court had not formally adopted a policy of allowing faxed filings, so defendants' motion was not appropriately entered by the court and, moreover, no filing fee for the motion was provided by defendants at the time the motion was submitted, instead being paid weeks later. Therefore, according to plaintiffs, the clerk should have entered a default against defendants as requested by plaintiffs. Plaintiffs, referring to defendants' motion as part motion part pleading on the speculation that the filing may have been an attempt at a counterclaim and/or answer, also argued that the filing should be dismissed under MCR 2.116(C)(8) (failure to state a valid claim) and (C)(9) (failure to state a valid defense), and for failure to abide by the

rules governing motion practice, MCR 2.119.³ Finally, plaintiffs requested summary disposition in their favor with respect to the complaint, asserting that their quiet-title claim was based entirely on “public record documents, written surveys performed by licensed surveyors,” and a sworn affidavit consistent with plaintiffs’ position, all of which were attached to the complaint.

Plaintiffs’ motion was served on defendants on April 8, 2013, by mail, and plaintiffs obtained a hearing date of April 30, 2013, which is the 22nd day after service. See MCR 1.108 (computation of time). Defendants failed to file any response to the motion. On April 30, 2013, plaintiffs’ motion was heard by the trial court. Defendant Paul Moon was present and unrepresented by counsel. Plaintiffs’ attorney informed the trial court that he had engaged in numerous talks with a relative of Mr. Moon, an attorney brother living in Florida, prior to the filing of the complaint in an effort to come to an amicable resolution of the dispute. According to plaintiffs’ counsel, nothing came of the negotiations due to, ultimately, a failure by Mr. Moon and his attorney brother to respond to communications and to otherwise cooperate.⁴ Plaintiffs’ attorney felt as if he and plaintiffs were simply being “strung along.” Mr. Moon told the court that his wife had left him, that he “had no funds to get an attorney,” that he had no idea what a motion for summary disposition was let alone how to respond to one, and that he did not believe that he had ever encroached on plaintiffs’ property. Mr. Moon then stated that he was close to having enough money for an attorney and had consulted with an attorney, but he needed more money before the attorney would actually appear in the case. At the trial court’s prompting, Mr. Moon asked for an adjournment or continuance. Plaintiffs asked the court to deny the request and enter an order granting their motion for summary disposition, as they had already been waiting a long time to obtain resolution, which had not occurred because of defendants’ delaying tactics. The trial court found that plaintiffs had “gone through enough of the delays,” and it granted plaintiffs’ motion for summary disposition.

An order was entered by the trial court on May 13, 2013, which provided that summary disposition was granted in favor of plaintiffs (not entry of a default or default judgment), with title to the property being quieted in their favor. The order further provided that defendants had 30 days to remove all encroachments, which would be deemed abandoned and become plaintiffs’

³ More specifically, plaintiffs maintained that defendants’ motion failed to “state with particularity the grounds and authority on which it [was] based,” MCR 2.119(A)(1)(b), that the motion failed because it was originally signed only by plaintiff Jeanne Moon and not her husband until later, MCR 2.119(A)(1)(d) (motion must be signed by party or attorney), and that no brief was attached as required for a motion “that presents an issue of law,” MCR 2.119(A)(2). Plaintiffs additionally argued that the motions failed to attach supporting written instruments as exhibits as required by MCR 2.113(F) when a claim or defense is based on a written instrument.

⁴ Plaintiffs’ attorney told the court that Mr. Moon’s brother did not respond to numerous letters and emails sent by counsel, which in part had explained to the brother the nature of Michigan property law, and that when the brother actually did respond, he took amazing positions on the dispute. Plaintiffs’ attorney further indicated, “Either he was ignorant of the law or he was sly like a fox and he was trying to string me along so perhaps they would gain enough time to make an adverse possession claim or something; I don’t know.”

property if not removed in 30 days. Also, the order stated that the pond located on the property was now exclusively owned by plaintiffs and that defendants could no longer encroach on the property, except to remove personal property items within the 30-day period. Finally, the order awarded plaintiffs taxable costs in the amount of \$444.

On May 7, 2013, about a week before the above order was entered, an attorney filed an appearance on behalf of defendant Mr. Moon. On May 28, 2013, Mr. Moon filed a motion for reconsideration. He argued that plaintiffs' motion for summary disposition was not filed and served at least 21 days before the time set for the hearing on the motion, thereby violating MCR 2.116(G)(1)(a)(i). Mr. Moon (hereafter "defendant" in the singular) noted that the timing of the hearing was significant, as had it been set properly, defendant could have consummated an attorney-client relationship before the hearing, giving good cause to adjourn the matter and allowing defendant to properly respond to the motion through counsel. With respect to plaintiffs' reliance on MCR 2.116(C)(8) and (9), defendant argued that his earlier-filed motion presented a valid defense, including failure to state a claim, alleged adverse possession and acquiescence, and noted factual disputes regarding the surveys and legal description measurements. Finally, defendant argued that he was not formally represented by counsel when his brother was helping him out, and any discussions between defendant's brother and plaintiffs' counsel was of no consequence and should not have been relied on by the court in making its ruling.

Plaintiffs filed a response to defendant's motion for reconsideration, and the motion was set for a hearing on August 6, 2013, by the trial court. At the hearing, the court found that the "motion" previously filed by defendants did not conform to the court rules regarding pleadings, in form or content, for purposes of potentially qualifying as an answer and/or counterclaim. The court also concluded that defendant's computation of time was incorrect with respect to the timeframe between the filing and service of plaintiffs' motion for summary disposition and the hearing thereon. The court instead found that the motion for summary disposition was filed and served at least 21 days before the time set for the hearing in compliance with MCR 2.116(G)(1)(a)(i). On August 22, 2013, the trial court formally entered an order denying defendant's motion for reconsideration. Defendant Paul Moon appeals as of right.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court reviews for an abuse of discretion a trial court's ruling on a motion for reconsideration. *Sanders v Perfecting Church*, 303 Mich App 1, 8; 840 NW2d 401 (2013). On appeal, defendant poses, for the most part, arguments pertaining to the construction and application of the court rules. This Court reviews de novo issues concerning the construction and application of the court rules. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). In *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011), our Supreme Court reviewed the principles applicable to the construction of a court rule, observing:

We interpret court rules using the same principles that govern the interpretation of statutes. Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text. If the text is unambiguous, we apply the language as written without construction or interpretation. [Citations omitted.]

Defendant first contends, as also argued below, that plaintiffs' motion for summary disposition was not filed and served at least 21 days before the date of the hearing on the motion, thereby violating MCR 2.116(G)(1)(a)(i). We conclude that this argument lacks merit. MCR 2.116(G) provides, in pertinent part:

(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

(a) Unless a different period is set by the court,

(i) a written motion under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the time set for the hearing[.]

MCR 1.108 addresses the computation of time with respect to court orders, the court rules, and statutes, providing in relevant part:

In computing a period of time prescribed or allowed by these rules, by court order, or by statute, the following rules apply:

(1) The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order.

Plaintiffs' motion for summary disposition was filed and served on April 8, 2013, meaning that April 9th, as plainly indicated in MCR 1.108(1), was the first day or day one of the 21-day period set forth in MCR 2.116(G)(1)(a)(i).⁵ Twenty-one days, therefore, would have elapsed on April 29, 2013, as computed under MCR 1.108(1). The hearing on plaintiffs' motion for summary disposition was conducted on Tuesday, April 30, 2013. Accordingly, the motion was "filed and served at least 21 days before the time set for the hearing[.]" MCR 2.116(G)(1)(a)(i). Defendant's argument that the court had to start counting *from* April 9th and go forward under MCR 1.108(1), making April 10th the first day of the 21-day period, finds no support in MCR 1.108(1) and directly conflicts with the plain and unambiguous language of the court rule. Furthermore, assuming error, it was harmless, as defendant's claims that he would have been able to procure counsel and obtain a continuance had there been compliance with MCR 2.116(G)(1)(a)(i) is entirely speculative; defense counsel did not even file an appearance until May 7, 2013. See MCR 1.105 ("These rules are to be construed to . . . avoid the consequences of error that does not affect the substantial rights of the parties."); *Hubka v Pennfield Twp*, 197 Mich App 117, 119-120; 494 NW2d 800 (1992) (absent the establishment of

⁵ April 8th would not have been counted in the computation because it was the day of the act – filing and service of the summary disposition motion – after which the designated period began to run. MCR 1.108(1).

prejudice, noncompliance with the court rules is harmless), rev'd on other grounds 443 Mich 864 (1993). Reversal is unwarranted.

Defendant next argues on appeal that the trial court erred in granting summary disposition in favor of plaintiffs, given that the court relied on evidence that was inadmissible under MRE 408 and on misleading information provided by plaintiffs' counsel. MRE 408 provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The evidence and information referred to by defendant concerned the discussion by plaintiffs' counsel at the summary disposition hearing regarding the pre-complaint negotiations between counsel and defendant's brother, and counsel's assertion that the brother employed delaying tactics. It is clear from our review of the transcript of the summary disposition hearing that the trial court did not rely on said evidence and information for the purpose of deciding liability, the validity of plaintiffs' action, or deciding to grant summary disposition in favor of plaintiffs, other than its timing. Rather, the trial court relied on the challenged evidence and information in relationship to determining whether it should grant a continuance or adjournment to defendant, which would be a valid purpose under MRE 408.⁶ There was no error, and reversal is unwarranted.

⁶ With respect to why the trial court granted summary disposition in favor of plaintiffs on plaintiffs' complaint, the record indicates that it was essentially defendant's failure to challenge plaintiffs' stance that a valid defense was never stated, MCR 2.116(C)(9). When confronted by the court with the fact that plaintiffs had filed a summary disposition motion and that defendant failed to respond to the motion, defendant stated that he did not know a response was necessary and that it "was [his] fault." When asked by the trial court whether he had a position or argument in response to the grounds raised by plaintiffs in support of summary disposition, defendant spoke of his current inability to obtain counsel and his lack of knowledge regarding the meaning of summary disposition. The trial court then explained to defendant that plaintiffs were contending that defendants' previous "motion" failed to state a valid defense to the quiet-title action. Defendant simply responded, "I don't believe I ever went over anybody's fence line. I don't think I ever encroached on anyone." At the hearing on the motion for reconsideration, the trial court additionally indicated that defendants' earlier motion or filing did not qualify as an answer to the complaint, thereby providing further support for summary disposition in favor of plaintiffs.

Defendant next argues that the trial court erred by failing to take into consideration his assertions of factual disputes and affirmative defenses set forth in defendants' "motion," which the trial court accepted as an answer to the complaint. Defendant claims that "[t]he trial [c]ourt . . . told the [court] [c]lerk to accept what was filed by the [d]efendants on December 4, 201[2,] as an answer." While perhaps this is true, which could explain why the clerk did not enter a default, there is no support for the proposition in the record. Regardless, at the hearing on the motion for reconsideration, the trial court, discussing defendants' motion or filing, stated:

It doesn't comply with the court rules regarding pleadings, and part of the problem is that he failed to properly characterize it. Technically, he has not answered.

At the end of the hearing, the trial court again stated that defendants' filing was not an answer under the court rules. Defendant maintains that his filing was effectively an answer to the complaint, that the allegations in the "answer" responded to plaintiffs' complaint, and that the allegations were sufficient to survive summary disposition under MCR 2.116(C)(9), as they constituted a valid defense. In *Talmer Bank & Trust v Parikh*, 304 Mich App 373, 384; 848 NW2d 408 (2014), this Court noted the principles applicable to resolving a motion for summary disposition brought pursuant to MCR 2.116(C)(9):

When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim. Granting summary disposition under MCR 2.116(C)(9) is appropriate if the defendant's pleadings are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recover. [Citations and quotation marks omitted.]

We hold that defendants' filing was simply not a proper "answer" under the court rules. MCR 2.111 provides, in relevant part:

(C) As to each allegation on which the adverse party relies, a responsive pleading *must*

(1) state an explicit admission or denial;

(2) plead no contest; or

(3) state that the pleader lacks knowledge or information sufficient to form a belief as to the truth of an allegation, which has the effect of a denial.

(D) Each denial *must* state the substance of the matters on which the pleader will rely to support the denial.

(E) (1) Allegations in a pleading that requires a responsive pleading, other than allegations of the amount of damage or the nature of the relief demanded, are admitted if not denied in the responsive pleading. [Emphasis added.]

Defendants' filing did not comply with these requirements; it was not even close to compliance. Therefore, the trial court did not err in failing to consider defendants' filing in the context of deciding plaintiffs' motion for summary disposition. Moreover, regardless of whether an answer was filed, the trial court also granted summary disposition in favor of plaintiffs because defendants did not respond to the motion for summary disposition. And defendant does not challenge that basis on appeal.

Defendant further argues that a responsive pleading was not necessary, given that his motion also requested a more definite statement, which request was never ruled on by the court, and plaintiffs never provided a more definite statement. MCR 2.115(A) provides:

If a pleading is so vague or ambiguous that it fails to comply with the requirements of these rules, an opposing party may move for a more definite statement before filing a responsive pleading. The motion must point out the defects complained of and the details desired. If the motion is granted and is not obeyed within 14 days after notice of the order, or within such other time as the court may set, the court may strike the pleading to which the motion was directed or enter an order it deems just.

The time for filing a responsive pleading is altered “[i]f the court has granted a motion for more definite statement, [in which case] the responsive pleading must be served and filed within 21 days after the more definite statement is served.” MCR 2.108(C)(4). We note, once again, that the motion for more definite statement was itself untimely. See MCR 2.108(A)(1). Regardless, although defendants moved for a more definite statement, and assuming compliance with the rules of motion practice as to filing, the payment of motion fees, and form, defendants never did a notice of hearing, nor, evidently, did they even contact the court to obtain a hearing date, and they failed to otherwise pursue resolution of the motion, which explains why it was never heard or addressed by the trial court. See MCR 2.119(E)(1) (“Contested motions should be noticed for hearing at the time designated by the court for the hearing of motions.”). Accordingly, defendant is not entitled to appellate relief. We also note that plaintiffs' complaint was more than sufficiently pled.

Finally, defendant argues that the trial court was required to allow him an effort to amend his pleadings under MCR 2.116(I)(5), which provides that “[i]f the grounds asserted [for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” An amendment should ordinarily be granted unless to do so would be futile. *Sanders*, 303 Mich App at 9. Defendant contends that he had a valid defense to plaintiffs' quiet-title action and that he asked the court for permission to amend in the motion for reconsideration.

At the hearing on the motion for reconsideration, the trial court appeared to rule that it was not required to allow an amendment, given that defendants' earlier filing did not even constitute an answer or pleading in the first place. We agree and conclude that there was no “pleading” to amend for purposes of MCR 2.116(I)(5) and MCR 2.118. Furthermore, at the hearing on the motion for summary disposition, defendant never requested an opportunity to amend anything, which request only came in the motion for reconsideration. Finally, while

defendant claims that if leave to amend had been granted, he would have been able to provide affidavits and surveys in support of his claims, he does not set forth any allegation-based, detailed facts in conjunction with real property legal principles and doctrines, such that it can be stated that he could plead a valid defense to plaintiffs' claim of ownership of the property. Defendant's arguments on appeal are merely conclusory. He, therefore, has not established that amendment would not be futile. Accordingly, the trial court did not abuse its discretion in denying defendant's request to amend, considering that amendment was not justified. *Sanders*, 303 Mich App at 8-9.⁷

Affirmed. Having fully prevailed on appeal, plaintiffs are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Michael J. Kelly

⁷ To the extent that defendant raises new issues in support of reversal in his appellate reply brief, e.g., the trial court erred in granting summary disposition in favor of plaintiffs where it relied on incomplete pleadings, arguments presented for the first time in a reply brief need not be considered by this Court, as reply briefs may only contain rebuttal argument. *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). Moreover, the reply brief fails to pose any arguments meriting reversal even if substantively considered.